

invention, the plant material must be readily available and reproducible to one skilled in the art without undue experimentation.

Euphorbia Charam has been sold under the trade name Euphorbia Redwing. It is doubtful that one skilled in the art who is interested in reproducing Charam would know to go to a foreign country and purchase plants under the different name of Redwing in order to replicate the plant. A plant breeder reading the Plant Breeders Rights grant for Charam would not know to go and purchase plants of Redwing in the United Kingdom.

A plant breeder wanting to replicate Charam would logically go out and try to purchase plants of Charam. The plant breeder would not find plants for sale under the name of Charam and therefore would not have any plants to replicate. The sale of Redwing in the United Kingdom does not enable the invention of Charam. The mere existence of plant material does not enable the invention.

For example, if a plant breeder was to file for a plant patent on a plant named X and the plant was sold under the name Y, others in the industry would never know that they are the same plant unless the plant patent applicant told them.

The office has the responsibility to establish a complete and accurate set of facts in making a rejection and may not rely upon unfound facts, unproven theories or hindsight reasoning.

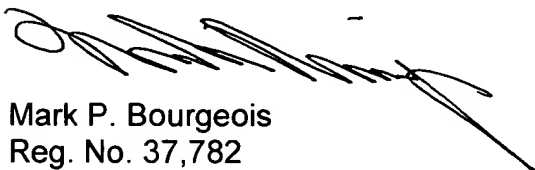
The knowledge or use relied on in a section 102 rejection must be knowledge or use in the United States. Prior knowledge or use which is not present in the United States, even if widespread in a foreign country, cannot be the basis of a rejection under section 102, *In re Ekenstam*, 256 F.2d 321, 118 USPQ 349 (CCPA 1958). There is no

evidence to support that it was known in the United States that Charam was being sold as Redwing.

The office has not proven beyond a doubt that a plant breeder would know to purchase plants of Redwing in order to reproduce Charam. There is no evidence to support the assertion that a plant breeder would know what Euphorbia plant to purchase in order to reproduce Charam.

For the extensive reasons advanced above, withdrawal of the 102 rejection is respectfully requested.

Respectfully submitted,



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